

COMMONWEALTH OF KENTUCKY  
28<sup>TH</sup> JUDICIAL CIRCUIT  
PULASKI CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO. 08-CI-01201

ENTERED GEORGE FLYNN, CLERK  APR 29 2009  PULASKI CIRC. DIST COURT BY <u>JD</u> D.C.
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COMMONWEALTH OF KENTUCKY,  
*Ex rel* Commonwealth's Attorney  
Eddy F. Montgomery

**Plaintiff**

v.

LADONNA H. THOMPSON, in her  
Official capacity as Commissioner,  
Kentucky Department of Corrections

**Defendant**

**DECLARATORY JUDGMENT AND  
PERMANENT INJUNCTION**

This matter is before the Court upon the Petition of the Commonwealth of Kentucky, *ex rel* Commonwealth's Attorney Eddy F. Montgomery, seeking a declaratory judgment and among other things, an order enjoining the Department of Corrections from applying select provisions of Kentucky's current budget bill, known as House Bill 406 ("HB 406"), retroactively. For the reasons stated herein, Montgomery's Petition is ***GRANTED IN PART*** and ***DENIED IN PART***.<sup>1</sup>

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<sup>1</sup> By agreement, much of the evidence considered at this stage of the proceedings is the same evidence presented by the parties prior to the granting of the Temporary Injunction on September 15, 2008. The evidentiary findings adduced in that Temporary Injunction were not controverted by subsequent testimony and thus have been adopted herein. In addition, the Court has borrowed heavily from other portions of that opinion and order.

### *Introduction*

HB 406 is Kentucky's current biennium budget bill. It became effective on April 18, 2008, and will remain in effect until June 30, 2010.

Paragraphs (4) and (5) of Section 5, subsection (c), provide:

(4) Probation and Parole Credit: Notwithstanding KRS 439.344, the period of time spent on parole shall count as part of the prisoner's remaining unexpired sentence when it is used to determine a parolee's eligibility for a final discharge from parole as set out in subsection (5) of this section or when a parolee is returned as a parole violator for a violation other than a new felony conviction.

(5) Minimum Expiration of Sentence: Notwithstanding KRS 439.354, a final discharge shall be issued when the prisoner has been out of prison on parole a sufficient period of time to have been eligible for discharge from prison by minimum expiration of sentence had he not been paroled, provided before this date he had not absconded from parole supervision or that a warrant for parole violation had not been issued by the board.<sup>2</sup>

Collectively, these two provisions form Kentucky's street credit<sup>3</sup> law which effectively suspends existing authority providing that the period of time spent on parole shall not count towards a prisoner's maximum sentence if the prisoner is returned to prison for a violation of parole. Ky. Rev. Stat. §§ 439.344, 439.354.

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<sup>2</sup> H.R. 406, 2008 Gen. Assem., Reg. Sess. (Ky. 2008).

<sup>3</sup> "Street credit" is a colloquial term used to describe credit for the time spent on parole towards a prisoner's sentence. See 67A C.J.S. Pardon & Parole § 90 (citing *Bonomo v. New Jersey State Parole Bd.*, 249 A.2d 611 (N.J. App. 1969); *Commonwealth ex rel. Nerwinski v. Cavell*, 144 A.2d 401 (Pa. 1958)).

The wisdom of the street credit provision of HB 406, and its alleged cost savings benefit to the Department of Corrections cannot be a concern of the judiciary. Those issues are political and properly vested in the discretion of this Commonwealth's legislators and executive officials. It is worth noting, however, that Kentucky's highest court commented on the sagacity of an early parole provision some eighty-six (86) years previously:

The statute which created the authority to grant paroles, as well as the statute under which . . . [the defendant] . . . was given an indeterminate sentence for his crime, were, indeed, enacted in an endeavor to uplift the convict, and coax him, if possible, into a useful citizen; but they also had in view, to some extent at least, the protection of society, and the protection of those who have not been guilty of felonies, and it is not conceivable that the Legislature intended, by these provisions, which are merely administrative, to enable a convict to escape the just punishment for his offense, and also to fail to conform his life to proper standards of citizenship. Such result would entirely defeat the purposes of the statutes, and *if a convict who has at least shown his inclination to commit crimes by doing an act by which he receives imprisonment in the penitentiary, however outrageous it might be, could at the end of his minimum term secure a parole and then escape any further consequences of his conduct by conforming to habits of good citizenship, which it must be admitted is chiefly to his own advantage, until the time when his sentence would have expired, if he had remained in prison, and then return to his evil habits and conduct, the convict would have escaped, in large part, the punishment for his crime, and society would gain nothing for the grace and assistance extended to him.*

*Commonwealth v. Minor*, 241 S.W. 856, 860 (Ky. 1922) (emphasis added).

The concern expressed by the court many years previously continues to

succinctly sum up the frustration that many victims and their families most likely feel today. Nevertheless, by virtue of its latest series of enactments, Kentucky is firmly committed to the concept of parole and to the diminution of the sentence of imprisonment through the award of various credits for educational achievement, obedience to the rules of incarceration, and now as an award for not obtaining additional felony convictions while on parole.

Our most recent street credit enactment came about in a manner akin to its 2003-2004 budget bill predecessor, HB 269, which contained a nearly identical street credit provision to that at issue today. Robert Lawson, a Professor of the University of Kentucky College of Law, and without question Kentucky's leading expert on the issue of penal reform, describes the passage of the 2003 provision thusly:

At the center was a Kentucky statute providing that "[t]he period of time spent on parole shall not count as a part of the prisoner's maximum sentence" if the inmate is returned to prison for violation of parole. *Not even inmates could complain with a straight face about the fairness and common sense of the position expressed in this law.* Nonetheless, in 2002 (before the early release program described above) a bill was introduced in the legislature to amend the statute to require full credit on prison terms for time spent on parole by inmates returned to prison for parole violations not involving new felony convictions. The bill went to the Senate Judiciary Committee, was given minimal and probably indifferent consideration, and then died on the legislative vine without as much as a committee vote. The thought of equating time on parole with time in prison in calculating completion of sentences proved to be too much to swallow in a "tough on crime" environment,

even with full prison facilities and a budget crisis on the horizon. At least, it was too much to swallow under the watchful eye of law enforcement officials and the general public.

The legislature opened its 2003 session with its members' attention focused primarily on the state's budget crunch. The inmate population problem in corrections was on the legislative radar screen because of the early release program, and it was on the public's mind for the same reason. No bill was ever introduced to resurrect the idea of equating time on parole with time in prison in calculating sentences, and no entry on the subject can be found in the action ledgers of those committees that could be expected to discuss and debate such an idea. Nonetheless, there emerged from the session a prison-sentence-calculation law identical to the bill that had died in the 2002 session:

Notwithstanding KRS 439.344, the period of time spent on parole shall count as a part of the prisoner's remaining unexpired sentence . . . when a parolee is returned as a parole violator for a violation other than a new felony conviction.

*The law came into existence without identifiable sponsors or supporters and without any open discussion or debate, buried away as a "special provision" in a budget bill that consisted of hundreds of pages in the session's enacted legislation. As a part of the budget bill, it makes no permanent change in the sentencing laws, will have no effect at the end of the budget period unless reenacted into law in some other form, and for these reasons alone looks almost like a desperate, certainly a feeble, attempt to address the serious population problems of the state's prison system. The fact that it came into existence as it did, out of the deep shadows of the General Assembly, suggests that there is enormous political risk in any action that appears to show softness toward crime, while the fact that it came into existence at all suggests that there are at least some people, most likely the professionals in the corrections*

department, who fully understand the magnitude and seriousness of the population problem in the prison system.

Robert G. Lawson, *Difficult Times in Kentucky Corrections—Aftershocks of a “Tough on Crime” Philosophy*, 93 Ky. L.J. 305, 307-308 (2004-2005)

(internal citations and footnotes omitted) (emphasis added). The current street credit provision contained within HB 406 appears to have arisen under strikingly similar circumstances, buried inside an otherwise massive budget bill and without identifiable debate or consideration by the entire General Assembly.<sup>4</sup>

Even so, it cannot be said that the General Assembly and Corrections should be faulted for concern over an ever burgeoning prison population and the spiraling costs of incarceration, both in terms of economics and the toll on Kentucky’s citizenry. Our legislature and executive officers would be remiss not to evaluate and address the budgetary and human costs associated with the exponential growth of state prisoners. *See* Lawson, 93 Ky. L.J. at 325.

But this too is not within the proper realm of the judiciary. The issues for this Court are much narrower and require no assessment of the much larger societal issues confronting a beleaguered legislature saddled with ever

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<sup>4</sup> Neither party produced any legislative history to contradict this conclusion.

increasing economic need and diminishing revenues. Accordingly, the Court turns to the very narrow issues presented for its consideration.

On August 18, 2008, Eddy F. Montgomery (“Montgomery”) filed his Petition for Declaratory Judgment and for Injunctive Relief in the Pulaski Circuit Court. In his Petition, Montgomery alleged *inter alia* that the street credit provisions of HB 406 were being improperly applied to award street credit to prisoners for time spent on parole prior to the effective date of the new enactment and that these provisions of HB 406 violated Sections 27 and 28 of the Kentucky Constitution. Section 27 provides:

The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

Section 28 provides that: “No person or collection of persons, being of one of these departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.” Accordingly, Montgomery contended the Court should declare the street credit provisions of HB 406 unconstitutional and grant temporary and permanent injunctive relief.

Montgomery also submitted an *ex parte* request for a restraining order preserving the status quo pending a response by the Department of

Corrections and an evidentiary hearing. The Court agreed that sufficient grounds existed to support temporary relief and issued the requested order pursuant to CR 65.03 restraining Ladonna Thompson (“Thompson”) from releasing from custody any prisoner currently incarcerated, or from granting a final discharge to any parolee who had been committed to the custody of the Department of Corrections by final judgment of the courts of the 28<sup>th</sup> Judicial Circuit as a result of the retroactive application of HB 406.

Thompson, on behalf of the Department of Corrections, filed a timely Answer which effectively denied nearly all of the factual averments of the Petition and challenged the jurisdiction and venue of the Pulaski Circuit Court.<sup>5</sup>

Following a series of evidentiary hearings,<sup>6</sup> the Court entered a Temporary Injunction on September 15, 2008. The provisions of the Temporary Injunction mirrored those of the *ex parte* Restraining Order.

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<sup>5</sup> Since then, Thompson has conceded that both jurisdiction and venue are proper.

<sup>6</sup> On August 14, 2008, the Court heard testimony in a related matter, *Commonwealth v. Larry Lee Ramsey*, Indictment Nos. 01-CR-00109 and 01-CR-00111 (Pulaski), prior to issuing the Temporary Injunction. While the *Ramsey* matter was mooted by the decisions in this case, the parties had agreed that the evidentiary record in *Ramsey* was relevant and should be considered in connection with this case.

The Court conducted an evidentiary hearing in this matter on August 27, 2008, prior to granting Montgomery’s request for interlocutory relief. Subsequently, the Court conducted an additional evidentiary hearing on February 5, 2009. The deposition testimony of John Hicks, the Deputy State Budget Director, was taken on February 16, 2009, in lieu of his appearance before the Court.



Thompson sought appellate relief. On January 23, 2009, the Kentucky Court of Appeals denied Thompson's request for interlocutory relief, holding that the Court had "thoroughly addressed and considered" the factors relevant to a temporary injunction and that "House Bill 406 contains no express authorization for retroactive application of the provisions at issue."<sup>7</sup> Thompson then initially sought discretionary review by the Kentucky Supreme Court. However, on February 26, 2009, at Thompson's behest, the Supreme Court voluntarily dismissed her petition seeking review of the Court of Appeals decision denying interlocutory relief. Thus, this Court's Temporary Injunction has remained in effect since inception.

This matter is now before the Court for final adjudication. The Court makes the following findings of fact in support of its Conclusions of Law.

### *Findings of Fact*

1. The Commonwealth of Kentucky, *ex rel* Commonwealth's Attorney Eddy F. Montgomery, brings this action pursuant to Kentucky's Declaratory Judgment Act;<sup>8</sup>

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<sup>7</sup> *Thompson v. Montgomery*, No. 2008-CA-001875-1, at 6-7 (Ky. App. Jan. 23, 2009).

<sup>8</sup> Because this declaratory judgment involves a claim that a statute, or portion thereof, is unconstitutional, notice is required to be provided to the Attorney General for the Commonwealth. The Court finds that such notice has been provided and that the Attorney General has not elected to intercede, though a case involving similar issues

2. The Respondent is Ladonna Thompson who currently serves as the Commissioner of the Kentucky Department of Corrections, (hereinafter "Corrections"), the entity obligated pursuant to Ky. Rev. Stat. § 196.030 with management of the Commonwealth's penal, reform and correctional institutions, and supervision of probation and parole;

3. Thompson has served as Commissioner since February 2008. She has a distinguished record of service within state government, serving for nineteen (19) years with Corrections prior to her appointment as Commissioner;

4. As Commissioner, Thompson is required by Ky. Rev. Stat. § 196.070 to supervise and administer numerous correctional facilities, and determine the minimum, maximum and conditional release dates of prisoners. In addition, Ky. Rev. Stat. § 196.075 requires the Commissioner to direct Corrections regarding the authority to supervise probationers and parolees;

5. Thompson oversees the current Corrections budget of approximately \$443 million of which approximately \$260 million is spent housing adults convicted of felony offenses;

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originated in the Franklin Circuit Court and is now, presumably, winding its way through the appellate process.

6. At least one prior similar version of this street credit legislation exists. HB 269, the 2003-2004 budget bill, contained a similar street credit provision. In litigation arising from application of HB 269, Corrections adopted a litigation posture against retroactive application of street credit arguing on several occasions that the statute was not expressly designated as retroactive by the General Assembly;

7. Kentucky's biennium budget process commences with a budget request being submitted by each state agency to the Governor's office and the Legislative Research Commission. Those individual requests represent each agency's appraisal of the sums necessary to meet its needs for a two year period. Utilizing these requests, the Governor's office, assisted by the office of the state budget director, compiles the proposed budget bill which is submitted to the General Assembly. This initial request is known as the "branch budget." The branch budget for the 2008-2010 biennial contained no language regarding street credit;

8. Following submission of the branch budget, each chamber begins compilation of a proposed budget. Those proposed budgets are submitted to each respective chamber's Appropriations and Revenue Committee and ultimately the Free Conference Committee (made of

members of both the House and Senate, totaling approximately sixteen members);

9. The initial budget proposed by the House contained significant budget cuts to Corrections when compared to the sums requested in the branch budget. The initial proposed Senate budget also reflected significant budget cuts when compared to Corrections' portion of the branch budget;

10. The modified budgets initially proposed by the House and Senate included the first mention of street credit. The street credit language contained within those initial proposed budgets was not altered in any manner by subsequent amendments or alterations to the proposed budgets of each chamber;

11. The author or authors of this language have not been identified by the parties;

12. The language ultimately adopted in Paragraphs (4) and (5) of Section 5, subsection (c) of HB 406 is nearly identical to language contained in HB 269, the 2002-2004 biennium budget;

13. HB 406 does not contain language which includes a title amendment, nor have any re-publication requirements been fulfilled. In addition, the street credit provision of HB 406 utilizes language indicative of the suspension of a statute, i.e., "*Notwithstanding* KRS 439.344 . . . ." HB

406, Section 5, subsection (c) (emphasis added). Nor does HB 406 reflect brackets, strikethroughs or underlining as required by Ky. Rev. Stat. § 446.145;

14. The initial proposed budgets prepared by both the House and Senate reflected substantial budget cuts to Corrections. The final version of HB 406 which was ultimately enacted included a \$12 million budget cut in fiscal year 2008-2009 and a \$19 million budget cut in fiscal year 2009-2010;

15. HB 406, in-so-far as it applies to Corrections, allocates significant sums for different categories of expenses including the following: (a) personnel costs; (b) operating expenses; (c) grants, loans and benefits; (d) debt service; and (e) capital outlay. Many, but not all, expenditures directly associated with housing inmates, including such costs as housing inmates in local jail facilities as opposed to a state correctional institutions, are taken from the grants, loans and benefits category rather than as might be expected, the operating expenses category. A plain reading of HB 406 indicates the General Assembly did not intend budget cuts to occur in the grants, loans and benefits category, but from other areas of Corrections' budget;

16. While Corrections is authorized upon written request and prior approval from the state budget director to re-allocate expenses and income

between categories (i.e., “the money follows the inmate”), no written request was submitted and no approval given to re-allocate the budget cuts mandated by HB 406 to the grants, loans and benefits category. In addition, according to Mark Robinson (“Robinson”), Director of Administrative Services for Corrections, there is no language within HB 406 which expressly permits the Department of Corrections to adjust inmate population numbers in order to effectuate a cost savings;

17. No discussion of the street credit provision ever arose in either legislative chamber and, thus, no discussion ever occurred regarding retroactive application. No discussion of the retroactive application of the street credit provision ever occurred in any committee meeting of either chamber;

18. A brief exchange regarding the financial impact of the street credit provision occurred in a meeting between Senate leadership and the State Budget Director, Deputy Budget Director (John Hicks), and Secretary of the Justice and Public Safety Cabinet after the proposed budget had passed out of the Senate Appropriations and Revenue Committee. At that meeting, three members of the General Assembly requested information regarding the cost savings related to the early release of prisoners. However,

no discussion regarding the retroactive application of the street credit language occurred during that meeting;

19. John Hicks ("Hicks"), the deputy state budget director with the primary responsibility for obtaining the costs savings estimates to Corrections from the street credit provision also served as state budget director during the General Assembly session which enacted HB 269, the 2002-2004 biennium budget. In his capacity as the former state budget director, Hicks was familiar with the street credit provision of HB 269 which had similar language to the street credit language contained within the present budget bill, HB 406. Hicks acknowledges that neither the former HB 269 nor HB 406 contain retroactive language regarding their identically worded street credit provisions. Hicks also acknowledges that if it was the intent to apply the street credit provision retroactively, it would have been possible to include language within the budget bill that stated it was to be applied retroactively or was intended to be remedial in nature, and that no such language appears within the language of HB 406 as enacted;

20. Following the meeting between the Senate leadership and members of the state budget office and the Justice Secretary, members of the state budget director's office met with staff members of Corrections to consider the request for information regarding the financial impact of the

early release of inmates. Robinson, Director of Administrative Services for Corrections, stated that after that request was made to the state budget director's office, he was asked to compile the cost savings report.

According to Robinson,

[w]hen we were given the legislative language and we were reading through it--that was the question, is it effective now forward or is it effective now back? And in . . . uh, uh . . . in anticipi . . . in trying to do the estimates, I was told to apply it . . . uh . . . for the current population of inmates now that are there, so that means retroactive.

The direction to calculate those numbers in a retroactive fashion "came from the Commissioner;"

21. Thus, in response to the request by the Senate leadership, the state budget office, assisted by Corrections' employees, submitted a mathematical analysis reflecting the anticipated cost savings of various Corrections related measures including the street credit provision of the proposed budget. Corrections calculations reflected a \$5,928,200 savings in Fiscal Year 2009 and a \$7,499,000 savings in Fiscal Year 2010;

22. Corrections did not provide alternate calculations which would have estimated cost savings based upon a prospective application of the street credit language of the proposed budget bill;

23. Though Corrections maintains the cost savings contained within their own mathematical analysis could not be achieved utilizing the street



credit provision of HB 406 without retroactive application, there is no language in either analysis which informed the legislative members who had requested the report that retroactive application of the street credit language would be required to achieve the projected cost savings. In other words, while the calculations prepared by Corrections require retroactive application to justify the projected costs savings, Corrections did not volunteer that information to any legislator, nor did any legislator request that information from any Corrections personnel or member of the state budget director's office;<sup>9</sup>

24. Though the exact number is unknown, it appears that only very few members of the General Assembly received Corrections' financial impact calculations. Aside from the Senate and House leadership who were

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<sup>9</sup> The report does contain a reference that the 2009 release total includes "the preponderance of back logged inmates." Corrections argues that according to Hicks, "that statement indicates that the majority of projected inmate releases were expected to be releases of prisoners currently incarcerated through the retroactive application of time spent on parole." When read fairly, this testimony confirms that Corrections knew that retroactive application would be required, but that knowledge can hardly be imputed to the General Assembly when no evidence exists to suggest that the General Assembly ratified Thompson's decision regarding retroactivity. Unlike the conclusion urged by Corrections, the Court finds the reference to "back-logged inmates" to be so ambiguous that it could not have notified the small minority of legislators which are known to have seen the reports that retroactive application was required to achieve the cost savings projected by Corrections. Moreover, no mention is made of "back logged" inmates in 2008.

sent the calculations, only the members of the Free Conference Committee were provided the calculations;

25. Like the Senate and House leadership members, no member of the Free Conference Committee asked any questions of Corrections personnel regarding the cost savings, nor did any member ever broach or discuss retroactive application of the proposed street credit language within the proposed budget bill. In fact, according to Hicks, deputy state budget director, and the only member of the Executive Branch present at the Free Conference Committee meeting, after Hicks distributed the projected cost savings analysis, “the members did not go through each document in a sequential order” and “there was not a specific discussion at that point in time . . . about the parole credit language and what—and discussion about its entire meaning . . . ;”<sup>10</sup>

26. The evidence establishes that Thompson determined that Corrections would apply the street credit provisions of HB 406 retroactively, thus, qualifying offenders who were convicted of felony offenses and on parole *prior* to the effective date of HB 406 to receive “street credit.” Thompson decided to apply the street credit provision of HB 406

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<sup>10</sup> Hicks testified that he was not surprised that the early release of prisoners was not discussed by the Free Conference Committee because “the Free Conference Committee is open to the public” and because the “cameras were rolling at that point . . . .”

retrospectively based in part on discussions conducted between herself, members of the Legislative Research Commission and members of the Justice Cabinet described above.

27. Once Thompson decided to apply the street credit provision of HB 406 retroactively, she orally relayed her decision to Thomas, the branch manager of offender information. Thomas in turn orally relayed this directive to her employees, including those employees responsible for the calculation of an offender's minimum and maximum expiration dates, which includes application of various credits, including "street credit," good time credit, and educational credit;

28. The street credit language found at Paragraphs (4) and (5) of Section 5, subsection (c), of HB 406, provide:

(4) Probation and Parole Credit: Notwithstanding KRS 439.344, the period of time spent on parole shall count as part of the prisoner's remaining unexpired sentence when it is used to determine a parolee's eligibility for a final discharge from parole as set out in subsection (5) of this section or when a parolee is returned as a parole violator for a violation other than a new felony conviction.

(5) Minimum Expiration of Sentence: Notwithstanding KRS 439.354, a final discharge shall be issued when the prisoner has been out of prison on parole a sufficient period of time to have been eligible for discharge from prison by minimum expiration of sentence had he not been paroled, provided before this date

he had not absconded from parole supervision or that a warrant for parole violation had not been issued by the board.<sup>11</sup>

29. Ky. Rev. Stat. § 439.344, referenced in the street credit provision of HB 406, provides: “The period of time spent on parole shall not count as a part of the prisoner’s maximum sentence except in determining parolee’s eligibility for a final discharge from parole as set out in KRS 439.354.” This statute represents the treatment of time spent on parole by an offender prior to the effective date of the street credit provision of HB 406;

30. Ky. Rev. Stat. § 439.354, referenced above, provides as follows:

When any paroled prisoner has performed the obligations of his parole during his period of active parole supervision the board may, at the termination of such period to be determined by the board, issue a final discharge from parole to the prisoner. Unless ordered earlier by the board, a final discharge shall be issued when the prisoner has been out of prison on parole a sufficient period of time to have been eligible for discharge from prison by maximum expiration of sentence had he not been paroled, provided before this date he had not absconded from parole supervision or that a warrant for parole violation had not been issued by the board.

31. Though familiar with the substantially similar street credit provision of the 2003 budget bill, Thompson rejected prior Corrections policy precluding retroactive application of street credit, nor did Thompson

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<sup>11</sup> H.R. 406, 2008 Gen. Assem., Reg. Sess. (Ky. 2008).

consult with the legal counsel for Corrections who had previously advocated against retroactive application of the 2003 street credit provision;

32. Prior to filing this action, Montgomery sought to declare the street credit provision of HB 406 unconstitutional in the matter of *Commonwealth of Kentucky v. Larry Lee Ramsey*, Indictment Nos. 01-CR-00109 and 01-CR-00111 (Pulaski). That matter has been held in abeyance;

33. While not a party to the *Ramsey* action, Corrections participated in the *Ramsey* litigation as *amicus curae*, and was present at the evidentiary hearing. Both parties have stipulated that the evidentiary record in *Commonwealth of Kentucky v. Larry Lee Ramsey* is relevant and should be considered by the Court in determining whether a temporary injunction should be granted in this matter;

34. Four witnesses testified at the evidentiary hearing conducted on August 14, 2008, in the *Ramsey* matter: Rebecca Light (hereinafter "Light"), John Hall, Tammy Lee, and Amy Lee. Three witnesses testified during the August 27, 2008 hearing held in this matter: Melissa Harrod, Julie Thomas (hereinafter "Thomas") and Thompson. Montgomery called each of the witnesses in his case-in-chief. Corrections elected to present no witnesses. The testimony of Hicks, deputy state budget director, was adduced by deposition;

35. Kentucky's recidivism rate for felony offenders committed to the custody of Corrections is approximately thirty (30%) to thirty-three (33%) percent over a two year period, and has remained unchanged for several years. However, this calculation represents recidivism rates based only upon new felony offenses committed after release from custody. Over a three year period, Kentucky's recidivism rate is approximately forty (40) percent, but again based only upon new felony offenses. National recidivism rates range as high as sixty-six percent (66%) over a period of three years. No research is available within the Commonwealth from Corrections which measures recidivism rates of felony and misdemeanor offenders. Research conducted by Corrections approximately eight (8) to ten (10) years previously indicates that violent offenders re-offend at a higher rate than nonviolent offenders;

36. The cost to the Commonwealth for offenders who recidivate has not been calculated by Corrections in the savings analysis conducted as part of the implementation of the street credit provision of HB 406, even though at least thirty percent (30%), and possibly a great many more, offenders released pursuant to HB 406 are likely to commit and be convicted of new felony offenses and returned to custody;

37. Though not implemented simultaneously with the effective date of the street credit provision of HB 406, Corrections has since implemented a new VINE notification protocol which alerts registrants, i.e. consisting usually of victims and their families, that an offender is eligible for “street credit.” Though registrants receive VINE notice, they have no recourse available through Corrections to object to the award of street credit or to the offender’s early release;

38. No written policies and procedures exist within Corrections regarding retroactive application of the street credit provision of HB 406;

39. The award of street credit applies to all qualifying felony offenders regardless of the severity of offense. Thus, offenders convicted of a gamut of crimes, from Class D felonies to those convicted of serious sexual offenses and murder, will benefit from street credit;

40. An offender released from custody, or a parolee granted a final discharge based in whole or in part on an award of street credit is no longer under *any* form of supervision by state or local correctional authorities and is not required to complete any mandated treatment, such as sexual offender or substance abuse treatment;

41. As of August 14, 2008, 1004 offenders statewide had been released from prison pursuant to the street credit provision of HB 406; As

of August 8, 2008, 1237 people had been discharged from parole at their minimum expiration date by application of the street credit provision of HB 406. Both numbers have dramatically increased since then;

42. As of September 2008, Corrections estimated that approximately 1500 additional offenders who were then incarcerated, and approximately 1000-1500 additional offenders then on parole would be released from custody or granted a final discharge due to the continued implementation of the street credit provision of HB 406;

43. Corrections neither tracks offenders who are granted a release or a final discharge pursuant to the street credit provision of HB 406 in order to determine how many re-offend, nor compiles records to determine how many of those released or granted a final discharge were convicted of serious offenses such as murder or sex offenses;

44. Because the street credit provision of HB 406 terminates with the expiration date of the current budget bill, some offenders currently on parole are likely to re-offend and agree to return to custody as parole violators so as to qualify for street credit prior to the expiration of HB 406;

45. Thompson concedes that, as a result of the substantially similar 2003 bill, offenders then on parole intentionally violated in order to receive street credit prior to expiration of the 2003-2004 budget bill. The cost of



these anticipated intentional violations has not been calculated into the cost savings estimated by Corrections;

46. Following enactment of HB 406, Corrections provided information to local probation and parole officers regarding the effect of the street credit provision of HB 406. At a monthly meeting of local probation and parole officers in Somerset, Kentucky in June 2008, Corrections officials advised that the street credit provision of HB 406 would affect the discharge date of parolees currently supervised in that Corrections would now utilize a parolee's minimum expiration date, instead of the maximum expiration date, to determine when an offender would be discharged from further parole supervision;

47. An offender's "maximum expiration date" is the date an offender's parole supervision will terminate assuming the offender does not violate his or her parole and is not returned to a correctional institution as a parole violator. Stated another way, the maximum expiration date is the date at which one's sentence would expire if served in its entirety without the benefit of any good time credit, i.e., it is the longest period one could possibly be kept in prison pursuant to a lawful sentence;

48. As explained by Corrections officials, the new street credit policy has the practical effect of lowering the maximum expiration date to

the minimum expiration date. Other testimony established that under the policy in effect since the effective date HB 406, offenders who do not violate their parole are released by final discharge from parole at their minimum expiration date rather than maximum;

49. The actual dates calculated for the maximum and minimum expiration dates are not altered by the street credit provisions of HB 406, but simply reflect a change in Corrections' policy. Offenders are now discharged from parole upon reaching their minimum expiration date as if they were incarcerated instead of on parole;

50. An offender's "minimum expiration date" is calculated as the maximum expiration date less any "good time credit" for which an offender is eligible. It is the date at which an offender would be released from incarceration if he or she were in custody serving his or her sentence and credited with "good time credit;"

51. "Good time credit" is authorized by statute. Ky. Rev. Stat. § 197.045(1) provides, *inter alia*, that "[a]ny person convicted and sentenced to a state penal institution may receive a credit on his sentence of not exceeding ten (10) days for each month served . . . ;"

52. Prior to the effective date of the street credit provision of HB 406, only those offenders actually incarcerated received “good time credit.” Offenders on parole did not receive good time credit;

53. “Good time credit” is awarded at the commencement of an offender’s sentence in anticipation of good conduct in accordance with Ky. Rev. Stat. § 197.045(1);<sup>12</sup>

54. “Meritorious good time” is a sentence-reducing credit that offenders can receive for good conduct on a discretionary basis.<sup>13</sup> Corrections conducts a records review annually to determine eligibility for “meritorious good time credit” of up to seven (7) days credit per month;

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<sup>12</sup> See Breen Combs, *Understanding Sentence Calculations and Application*, 25 (No. 5) The Advocate 30, 31 (Sept. 2003) (“Although statutory good time is only ‘earned’ when the month has been served, as a practical matter an allocation of the statutory good time credit applicable to the inmate’s sentence is placed on his Resident record Card in advance.”).

<sup>13</sup> Meritorious good time (“MGT”) was not explained in detail during the hearing. MGT is authorized by CPP 15.3, which was adopted by the Department of Corrections pursuant to specific authority delegated by the legislature in KRS 197.045(3):

An inmate may, at the discretion of the commissioner, be allowed a deduction from a sentence not to exceed five (5) days per month for performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations and programs. The allowance shall be in addition to commutation of time for good conduct and under the same terms and conditions and without regard to length of sentence.

The Court cannot reconcile, on its own, the statutory authorization for up to five (5) days MGT with the seven (7) day MGT testified to at the hearing.

55. Prior to the effective date of HB 406, “good time” only had relevance to offenders who were actually serving a sentence of imprisonment within a penal institution. Since HB 406 became effective, all offenders—without regard to whether they are incarcerated—receive the benefit of “good time” credit. Offenders are discharged from parole supervision substantially earlier than before because of the street credit provision of HB 406. Explained alternatively, “good time” credit is now awarded for time not incarcerated, contrary to the language of Ky. Rev. Stat. § 197.045(1), enabling offenders to be discharged at their minimum expiration dates;

56. Rebecca Light, a Pulaski County Probation and Parole Officer, provided one example of the effect of retroactive application of the street credit provision of HB 406 as it applies to parolees. In this particular instance, Corrections awarded street credit to the offender, whom Light had supervised on parole since becoming a probation and parole officer eighteen (18) years previously, and then granted the offender a final discharge. In effect, this particular offender received a retroactive award of approximately fifteen (15) years of street credit due to HB 406, which has only a two (2) year effective period;

57. After passage of HB 406, Corrections provided each probation and parole officer a list of parolees potentially eligible to receive street credit following implementation of the new policy. These lists were generated by the offender information division of Corrections. The list provided by Corrections to Light identified approximately twenty-three (23) offenders. As of August 15, 2008, three of the offenders identified on Light's list (Dillard Cotton, Rockcastle County; Carrie Glover, Pulaski County; and Becky Pounders, Rockcastle County),<sup>14</sup> had received a final discharge from parole based upon retroactive application of the street credit provision of HB 406;

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<sup>14</sup> The Court has no record of a felony conviction involving Dillard Cotton in Rockcastle County. The Court's files reveal the following information regarding the latter two offenders:

Glover pled guilty to Cultivating Marijuana, Over Five (5) Plants, and was sentenced to three (3) years imprisonment probated for three (3) years. Less than two months later, Glover used cocaine and was revoked.

Pounders pled guilty to Complicity to the Fraudulent Use of a Credit Card and three counts of Criminal Possession of a Forged Instrument, Second Degree. The Court sentenced Pounders to a total of two years imprisonment probated for three years on conditions which included that she make over \$5,000 in restitution. Within a few short months thereafter, Pounders failed to pay her restitution and was arrested in Logan County on new charges. Rather than revoking her probation, the Court continued Pounders on probation and imposed the additional requirements that she serve forty-five days in the county jail, and that she obtain employment and again, pay her restitution. One year later, Pounders was again before the Court for failure to pay her restitution. The Court again continued her on probation and directed that she pay restitution. When Pounders again refused to make her restitution, the Court revoked her probation in June 2006. No evidence has been introduced indicating whether Pounders paid her restitution prior to her discharge from parole supervision.

58. Generally speaking, Corrections will not seek to revoke an offender's parole except upon a new felony conviction or when an offender absconds from parole.<sup>15</sup> Misdemeanor convictions, regardless of how numerous or serious, and new felony charges not yet resulting in a conviction, are not generally treated as a basis for revocation of parole;

59. Thus, according to uncontroverted testimony, an offender subject to parole supervision who is arrested for a new felony offense, or innumerable misdemeanor offenses, could complete parole supervision while awaiting final disposition of the new felony charge under the current application of the street credit provision of HB 406;

60. In most instances, after Corrections determines that an offender should be released from custody or granted a final discharge, but prior to his or her actual release or discharge, Corrections officials review each offender's criminal record to determine whether he or she has obtained a new felony conviction, he or she has not absconded, and whether another agency has lodged a detainer. Only the presence of a detainer is likely to preclude the release or discharge of an offender otherwise qualified for release utilizing the "good time" provision of HB 406. Offenders on parole,

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<sup>15</sup> Any act or omission not constituting a new felony conviction or absconding parole supervision is classified by Corrections as a "technical violation" and thus, though perhaps legally sufficient to warrant revocation, is not generally treated by Corrections as a basis for revocation.

for example, who had obtained a new felony conviction while on parole, would still be granted a final discharge from parole so long as he or she had not been *returned* to prison as a parole violator;

61. Three specific examples of offenders affected or potentially affected by the street credit provision of HB 406 were provided. These three offenders are identified as Larry Ramsey, Richard Roberts, and Hubert Rowe;

62. The Pulaski Circuit Court sentenced Larry Ramsey to a total of 25 years imprisonment. This lengthy sentence followed two jury trials. In the first, a Pulaski County petit jury found Ramsey guilty of Operating a Motor Vehicle While under the Influence of Alcohol or Drugs, Fourth or Subsequent Offense, and Operating a Motor Vehicle on a DUI Suspended License, Third Offense. The Court imposed the jury's recommended sentence of five (5) years.

In his second trial, a Pulaski County petit jury found Ramsey guilty of Operating a Motor Vehicle While under the Influence of Alcohol or Drugs, Fourth or Subsequent Offense, Wanton Endangerment in the First Degree, Operating a Motor Vehicle on a DUI Suspended License, Third Offense, and Persistent Felony Offender, First Degree. The Court again adopted the jury recommended sentence of twenty (20) years and subsequently ordered that

these sentences be served consecutively for a total of twenty-five (25) years.<sup>16</sup>

Despite the lengthy sentences recommended by the citizens of Pulaski County and adopted by the Court, the Kentucky Parole Board granted Ramsey parole. An explicit condition of Ramsey's parole was that he not operate a motor vehicle. Since being granted parole, Ramsey has accrued two new convictions, August 8, 2006, and November 7, 2006, for operating a motor vehicle on a suspended or revoked license.

Because these violations of the express terms and conditions of parole are considered only "technical" violations by Corrections, Ramsey remains on parole supervision;<sup>17</sup>

63. The Scott County Circuit Court sentenced offender Richard Roberts to a five (5) year sentence of imprisonment, which was probated in December 1999. The court later revoked Roberts' probation for violations

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<sup>16</sup> Both convictions were later affirmed. The Kentucky Court of Appeals (02-CA-000422-MR) affirmed the first of these convictions on July 11, 2003. The Kentucky Supreme Court affirmed the second conviction on January 20, 2005 which is reported at *Ramsey v. Commonwealth*, 157 S.W.3d 194 (2007).

<sup>17</sup> Were Ramsey to reach the minimum (as opposed to the former maximum) expiration date of his sentence while on parole, prior to HB 406 lapsing, which is an unlikely if not impossible occurrence, he would be entitled to receive street credit for the entire time spent on parole and thus would be completely discharged from all forms of supervision despite the unquestioned violation of his parole on at least two occasions.

Unlikely as it is that Ramsey himself will receive street credit, it is very likely, if not a near certainty, other offenders similar to Ramsey will nonetheless receive the benefit of street credit pursuant to HB 406 prior to its expiration on June 30, 2010.



of a nature unknown to this Court, and he began serving his five year sentence on September 6, 2002.

The Parole Board released Roberts on March 9, 2004 and lodged on a detainer on April 14, 2006 due to some infraction of his parole. Roberts was only detained briefly because he agreed to enter and complete a substance abuse program (SAP). Thereafter, Corrections released Roberts awaiting an open bed in the SAP program.

The SAP program terminated Roberts due to his noncompliance and he was lodged in the Oldham County jail. The Parole Board reinstated Roberts' parole on March 12, 2007.<sup>18</sup> A social services clinician referred Roberts to an intensive outpatient substance abuse treatment program in Georgetown at Counseling Associates.<sup>19</sup> The program discharged Roberts because he failed to report as directed. After Roberts provided a medical excuse, the program reinstated him. Shortly thereafter, in August 2007, Roberts tested positive for alcohol and was again terminated.

Corrections determined it would be in Roberts' best interests to return to the SAP program operated by the Commonwealth and Roberts agreed to do so. Corrections agreed to continue Roberts on parole provided that he

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<sup>18</sup> At that time, Roberts' maximum expiration date was March 3, 2010.

<sup>19</sup> That program entailed meeting twice a week for four months then once a week for two months.

complete the SAP program and attend Counseling Associates in the interim pending the availability of a bed at SAP.<sup>20</sup>

The Parole Board released Roberts in March, adding specific conditions that Roberts was to have no contact with the victim or his or her family, he was not to operate a motor vehicle except for work and treatment purposes, and that he seek substance abuse evaluation and follow all treatment recommendations.

Roberts reported to Counseling Associates but tested positive for alcohol yet again. In addition, Roberts had an excessive number of absences and was again terminated from participation.

Thereafter, Corrections directed Roberts to attend the VOA program in Louisville, whereupon Roberts absconded from supervision in October 2007.<sup>21</sup>

On November 14, 2007, police arrested and jailed Roberts in Scott County. Again, Roberts met the Parole Board.

In April or May, 2008, Robert's parole officer received a telephone call from a citizen complainant who was angered because he and Roberts

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<sup>20</sup> In reliance on this agreement, Corrections executed a continuance on September 19, 2007.

<sup>21</sup> In addition to his failure to report, police charged Roberts with a new offense in the Scott District Court, which subsequently resulted in an indictment by the Scott County Grand Jury.

had some disagreements in the past. The caller demanded to know why Roberts was not incarcerated. Utilizing the Corrections' database, Roberts' Probation and Parole Officer determined that Roberts had been released from incarceration without any parole supervision, i.e. a "serve out," in the spring of 2008.

Roberts' parole officer also learned that following Roberts' release by Corrections, Roberts rammed his vehicle into a residence while intoxicated. In a television interview, Roberts stated that the incident was due to alcohol addiction and that he had never been afforded substance abuse treatment.

According to Roberts' Probation and Parole Officer, but for the retroactive application of the street credit provision of HB 406, Roberts could not have received a "serve out" and been released at such an early date;

64. Hubert Rowe was convicted of murder in Pulaski County in 1978 and remanded into the custody of Corrections. In 1982, Rowe escaped from prison and received an additional one and one-half (1½) years sentence of imprisonment to be served consecutively to his original twenty (20) year sentence.

In 1982, while on parole, police arrested Rowe for a new felony offense, Theft by Unlawful Taking, Over \$300. The Court sentenced Rowe to one year imprisonment to be served concurrently with his other sentences.

The Parole Board released Rowe again, and he again committed a new felony offense while on parole, this time receiving an additional five (5) years sentence of imprisonment. The court remanded Rowe again to the custody of Corrections.

Yet again, the Parole Board released Rowe. Not surprisingly, Rowe committed another felony offense, Unlawful Imprisonment, First Degree. Following sentencing, the Court again remanded Rowe to the custody of Corrections.

Only recently, Corrections ordered Rowe released from custody after awarded 905 days of retroactive "street credit." In all, Rowe had been granted parole on five separate occasions, was convicted of new offenses on two of those five occasions and yet he was still granted street credit retroactively for the three periods of parole in which he avoided new felony convictions;

65. As a result of the retroactive application of the street credit provisions of HB 406, many more prisoners and parolees have been released

from custody and/or supervision than were originally projected by Corrections;

66. Also as a result of the retroactive application of the street credit provisions of HB 406, Corrections achieved the projected costs savings in November, 2008, yet continue to apply the street credit provisions retroactively;

67. The projected savings costs prepared by Corrections did not reflect any offset for the broader societal costs incurred when a prisoner released from custody or parole supervision by the retroactive application of the street credit provision of HB 406 re-offends;

68. In a publication produced by the Executive Branch after passage of HB 409, the Governor's Office indicated that a costs savings to the Department of Corrections would be obtained from "application of parole time credit" and "the credit of time spent on parole toward remaining sentence of incarcerated parole violators . . . ." This document is not a portion of the actual budget, but merely reflects the executive branch's summary of the budget as actually passed by the General Assembly and signed into law by the Governor. The summary itself has no legal effect and, in any event, does not reflect an expressed intent by the General Assembly to apply the street credit provision of HB 406 retroactively;

69. An examination of HB 406 does not reveal any language which references any date prior to the biennium budget period such as appeared in the legislation at issue in *Baker v. Fletcher*, 204 S.W.3d 589 (Ky. 2006).

70. HB 406 expires June 30, 2010. Accordingly, barring new action by the General Assembly, the street credit provision of HB 406 will also expire on that date;<sup>22</sup>

### *Conclusions of Law*

Montgomery presents six arguments in his bid to invalidate the street credit provision of HB 406. These claims can be divided into two categories, those which are constitutionally based and those which are statutorily based.

Montgomery's contention that the street credit provision of HB 406 improperly infringes upon the powers of the Executive and Judicial Departments in violation of Sections 27 and 28 of the Kentucky Constitution, and his claims that the use of the street credit provision violates principles of equal protection given that Corrections obtained a previous ruling by the Kentucky Court of Appeals invalidating the retroactive application of similar language, fall into the former category of constitutionally based claims.

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<sup>22</sup> This spring, the General Assembly adopted legislation which purports to make permanent certain portions of HB 406 while failing to adopt other portions.

Those remaining claims, including Montgomery's arguments that the current use of street credit by Corrections is an act of clemency and that oral implementation of the street credit provision of HB 406 by the Department of Corrections is improper, are each premised upon an alleged conflict with other statutes. *See* Ky. Rev. Stat. § 13A.100 (requiring promulgation of regulations implementing a statutory change). Mindful of the principal that Kentucky courts are to abstain from reaching constitutional issues when other, non-constitutional, grounds can be relied upon to resolve a controversy, the Court declines to reach Montgomery's constitutional claims. *Baker v. Fletcher*, 204 S.W.3d 589, 597-598 (Ky. 2006) (citing *Dawson v. Birenbaum*, 968 S.W.2d 663 (Ky. 1998)). The Court also declines to reach nearly all of Montgomery's statutorily-based claims because the Court's resolution of Montgomery's retroactivity claim renders all others moot.

Thus, the primary issue at hand is whether Corrections' application of the street credit provisions of HB 406 in a retroactive manner is permissible. Given that (1) this Court can discern no intent by the General Assembly to apply the street credit language of HB 406 retroactively, and (2) the Kentucky Court of Appeals has considered this street credit language on at least two occasions and determined that it contains no express language

authorizing retroactive application, the Court has no difficulty in again concluding that Corrections is acting improperly and should therefore be restrained from continued retroactive application of Paragraphs (4) and (5) of Section 5, subsection (c) of HB 406.

*I.*

Upon the record before it, this Court is unable to discern a legislative mandate to apply Paragraphs (4) and (5) of Section 5, subsection (c) of HB 406 retroactively. In fact, given the completion of the evidentiary record, the Court is even more firmly convinced that Corrections is improperly applying the street credit provisions of HB 406 without the required manifestation of intent from the legislative and thus in derogation of existing law.

While Corrections argues that the street credit language contains no limiting language and thus should be presumed to apply retroactively, the Court believes that a limitation on retroactivity arises by statute.<sup>23</sup> Ky. Rev.

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<sup>23</sup> In its argument on this point, Corrections takes some pains to educate a “misinformed” Plaintiff that inmates are not granted parole multiple times. This seems to be an issue of semantics rather than substance. In Corrections’ parlance, an inmate is paroled only once, no matter how many different times he or she is returned to prison. Each re-admission to the privilege of parole is a “reinstatement” of the original parole. While perhaps technically correct, the real issue for most of the public and those unschooled in the proper parlance, is that the testimony in this case establishes that some convicted felons are paroled, commit new crimes, convicted and returned to prison, then once again released on parole, convicted of new crimes and returned to prison, and so on and so on. Under Corrections’ policy, these parolees are granted street credit for each



Stat. § 446.080(3) provides that “[n]o statute shall be construed to be retroactive, unless expressly so declared.” In *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 499-500 (Ky. 1998), our Supreme Court explained the importance of the prohibition contained within Ky. Rev. Stat. § 446.080(3):

This is a principle fundamental to statutory construction in Kentucky. The courts have consistently upheld this admonition and have declared that there is a strong presumption that statutes operate prospectively and that retroactive application of statutes will be approved only if it is absolutely certain the legislature intended such a result. This is particularly true when the legislation is substantive and not remedial, and new rights and new duties are created. We cite only a few of the numerous cases which confirm that principle as follows: *Gould v. O'Bannon*, Ky., 770 S.W.2d 220 (1989); *Hudson v. Commonwealth*, Ky., 597 S.W.2d 610 (1980); *Roberts v. Hickman County Fiscal Court*, Ky., 481 S.W.2d 279 (1972); *Webster County Soil Conservation Dist. v. Shelton*, Ky., 437 S.W.2d 934 (1969); *Davis v. Commonwealth Life Ins. Co.*, Ky., 284 S.W.2d 809 (1955); *City of Covington v. Sohio Petroleum Co.*, Ky., 279 S.W.2d 746 (1955); *ITT Commercial Finance Corp. v. Madisonville Recapping*, Ky. App., 793 S.W.2d 849 (1990).

Even more recently, our Supreme Court again emphasized that only when the General Assembly expressly manifests such a desire is a statute to be applied retroactively. *Baker*, 204 S.W.3d at 597. The inquiry focuses on

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failed period of parole supervision (some occurring more than fifteen or more years ago) no matter how many new felony crimes they have committed.

the intent of the legislature, rather than an obligatory incantation.<sup>24</sup> *Id.*

“What is required is that the enactment make it apparent that retroactivity was the intended result.” *Id.* (citing *Commonwealth of Kentucky, Dept. of Agriculture v. Vinson*, 30 S.W.3d 162 (Ky. 2000); *Taylor v. Asher*, 317 S.W.2d 895, 897 (Ky. 1958)).

Thus, in *Baker*, the Supreme Court noted that the budget bill, though enacted late, nevertheless referenced a cost-of-living adjustment for eligible state employees in fiscal years 2002-2004; moreover, the Court identified language within the Senate budget bill provided that “this Act shall apply to periods preceding the effective date of . . . [the House budget bill]. . . .”

Thus, though no form of the word “retroactive” appeared in the language of the 2002-2004 biennium budget, the Supreme Court had no difficulty in determining that the legislation was intended to suspend an existing statute which would have required a 5% cost-of-living adjustment and instead awarded a 2.7% cost-of-living adjustment for the entire 2002-2004 biennium budget period.

Utilizing the language of the enactment of HB 406, as instructed in *Baker*, this Court cannot reach a result consistent with the position urged by

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<sup>24</sup> While the possible permutations of appropriate language are numerous, the Court observes for descriptive purposes only that the General Assembly could have simply stated that the “period of time spent on parole, including time spent on parole prior to the effective date of this enactment, shall count as part of the prisoner’s unexpired sentence.”

Corrections. The Court has parsed the evidentiary record, including the complete language of HB 406 and cannot locate any language which expressly authorizes the retroactive application of the street credit provision of HB 406. There are no references, as existed in *Baker*, which would suggest that HB 406 was intended to apply to a date prior to the biennium period. Consequently, the Court cannot conclude that an “express” authorization of retroactivity appears in HB 406 as required by Ky. Rev. Stat. § 446.080(3).

Instead of relying upon the language of the enactment to discern legislative intent, Corrections directs the Court to a brief series of contacts and requests between members of the General Assembly and Executive branches. Corrections suggests that the budget constraints imposed by the General Assembly were intended to be entirely offset by the cost-savings associated with the early discharge of thousands of convicted felons from custody and parole supervision. The Court is not convinced.

The facts in this matter have been largely undisputed. To her credit, Thompson unequivocally stated that the decision to apply the street credit language of HB 406 was hers. And the subsequent testimony supports this admission.

According to Hicks, the deputy state budget director, the street credit language appeared in the initially-proposed House and Senate budgets without input from Corrections. Then, again according to Hicks, sometime after the language first appeared, a small group of legislators, probably numbering from three to five, requested information from the deputy state budget director about the impact of the street credit language. No mention was made of retroactivity and no legislator ever suggested or even hinted that prisoners should be given parole credit for periods years prior to 2008-2010.

Hicks then requested that Corrections calculate costs savings. And, according to the un-controverted testimony of Robinson, the Director of Administrative Services and the employee within Corrections actually charged with the responsibility for making those costs savings calculations, he and other Corrections officials read the proposed street credit language and asked themselves, "Does this language apply prospectively or retrospectively?" Only then did Thompson instruct her employees to apply the pending enactment retrospectively. Once Corrections calculated the projected costs savings, those compilations were provided to the state budget office which then provided them to a small number of legislators. Again, no questions were asked by the members of the General Assembly, and no

debate ever occurred. Put simply, Corrections was never asked about the method that cost savings were estimated, and the evidence reveals that Corrections certainly never volunteered the information. In any event, the decision to apply the street credit provision of HB 406 did not arise within the General Assembly but rather within Corrections. The subsequent adoption of the cost savings projections provided by Corrections to a small number of legislators, without question or identifiable comment, is hardly an endorsement of retroactivity that rises to the “manifest” expression required by Ky. Rev. Stat. § 446.080(3) or *Baker*.

## *II.*

Even were the Court inclined to interpret the plain language of HB 406 in a manner calculated to permit retroactive application, this Court has only a limited ability to do so given prior determinations by the Kentucky Court of Appeals. “On all questions of law the circuit and district courts are bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court and, when there are no such precedents, those established in the opinions of the Court of Appeals.” SCR 1.040(5).

Though notions of binding precedent and *stare decisis* involve differing relationships between courts, these principles are rooted in the

same notions.<sup>25</sup> As our Supreme Court recently reminded, “*stare decisis* [is] the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.” *Chestnut v. Commonwealth*, 250 S.W.3d 288, 295 (Ky. 2008) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265-265 (1986)).

This doctrine has been described as the method by which legal principles are permitted to develop in an “evenhanded, predictable, and consistent” manner which “fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Matheney v. Commonwealth*, 191 S.W.3d 599, 608-609 (Ky. 2006) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827-830 (1991) (Souter, J., joined by Kennedy, J., concurring)). Thus, by looking and adhering to precedent, the Courts of the Commonwealth ensure uniform application of the law except in those circumstances where material factual distinctions occur or on those occasions when it becomes necessary to avoid perpetuation of obviously erroneous reasoning. *See Daniel's Adm'r v. Hoofnel*, 155 S.W.2d 469, 471 (1941) (“This wholesome rule [*stare decisis*] is not inflexible or so imperative as to require perpetration of error.”).

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<sup>25</sup> Generally, binding precedent involves an inferior court’s respect or obligation in-so-far as a higher court’s prior determinations of law are concerned while *stare decisis* typically involves a court looking to its own previous decisions involving the same issue.

In this instance, the Court is not writing upon a blank slate.<sup>26</sup> In a case involving the street credit language which appeared in the 2002-2004 biennium budget, the Kentucky Court of Appeals addressed a prisoner's challenge to Correction's determination that he was not entitled to credit for time spent on parole against his imposed sentence following revocation of his parole. *Noland v. Department of Corrections*, 266 S.W.3d 249 (Ky. App. 2008). The Court of Appeals rejected Noland's argument that the street credit provision of HB 269 apply retroactively, stating:

Ordinarily, time spent on parole "shall not count as a part of the prisoner's maximum sentence except in determining [a] parolee's eligibility for a final discharge from parole[.] However, in 2003 the General Assembly sought to alleviate overcrowding of penal institutions and to decrease the amount spent by the Commonwealth to incarcerate offenders. Consequently, the biennial budget passed that year contained a provision temporarily suspending the operation of KRS 439.344. . . .

. . . .

Although there are no published cases on point, this Court has previously considered a similar issue in *Harper v. Kentucky Dept. of Corrections*, 2005 WL 789140 (Ky. App. April 8, 2005) (No. 2003-CA-002447-MR), which we view as

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<sup>26</sup> Aside from the single published case on this issue, and *Harper v. Kentucky Department of Corrections*, 2005 WL 789140 (Ky. App. April 8, 2005), the unpublished decision referenced in *Noland v. Department of Corrections*, 266 S.W.3d 249 (Ky. App. 2008), the street credit provision of HB 269 has been addressed by at least three other panels of the Kentucky Court of Appeals. See *Hillman v. Rees*, 2008 WL 4092904 (Ky. App. September 5, 2008); *Fredericks v. Fletcher*, 2005 WL 1491235 (Ky. App. June 24, 2005); *Perry v. Kentucky State Legislature*, 2004 WL 2757009 (Ky. App. December 3, 2004).

persuasive authority pursuant to Kentucky Rules of Civil Procedure (CR) 76.28(4)(c). The inmate in *Harper* argued that H.B. 269 was remedial and procedural in nature and, thus, should be construed retroactively. In analyzing the issue we determined as follows:

While a statute should be construed to carry out the intent of the legislature, *see* KRS 446.080(1), KRS 446.080(3) states that “[n]o statute shall be construed to be retroactive, unless expressly so declared.” *The provision at issue in H.B. 269 contains no express declaration of retroactivity.* Remedial or procedural statutes can be retroactively applied in the absence of an express declaration of retroactive application if consistent with the legislative intent. *Spurlin v. Adkins*, 940 S.W.2d 900 (Ky. 1997). However, the provisions of a budget bill are only effective for the time period of the budget. *See* KRS 48.310. *We believe that if the General Assembly intended to provide a remedial statute, it would have permanently amended KRS 439.344 instead of providing a temporary suspension of the statute through the budget bill. Accordingly, we conclude that H.B. 269 was not intended to be retroactive.* The law in effect at the time of [the inmate's] parole revocations at issue . . . was KRS 439.344, under which he is not entitled to receive credit towards his remaining unexpired sentence for time spent on parole.

*Noland*, 266 S.W.3d at 250-251 (quoting *Harper v. Kentucky Dept. of Corrections*, 2005 WL 789140 (Ky. App. April 8, 2005) (No. 2003-CA-002447-MR) (emphasis added)) (citation omitted). Though an argument could be made that *Noland* does not precisely present the identical situation



herein, the Court does not find that argument persuasive. Accordingly, the court determines that *Noland* constrains this Court's options.

Moreover, the Kentucky Court of Appeals has even more recently addressed the street credit language though in an admittedly different procedural posture. In January, 2009, the Kentucky Court of Appeals squarely addressed Thompson's arguments concerning the street credit language HB 406 in a bid to obtain interlocutory relief from this Court's temporary injunction. The Court of Appeals, consistent with each prior ruling in those cases involving HB 269, determined that "Kentucky law is clear that statutes are not to be construed to be retroactive 'unless expressly declared.' *House Bill 406 contains no express authorization for retroactive application of the provisions at issue.*" *Thompson v. Montgomery*, No. 2008-CA-001875, at 6 (Ky. App. Jan. 23, 2009) (citations omitted) (emphasis added).

The Court does not lightly discharge its obligations to the parties by rote application of the principals set forth in *Noland*, or even by the Court of Appeals in an earlier interlocutory matter. Indeed, were a sufficient factual distinction offered, or a different conclusion compelled by developing legal standards, the Court would have little hesitancy in documenting those dissimilarities and announcing a different result. *See Payne v. City of*

*Covington*, 123 S.W.2d 1045, 1050-51 (Ky. 1938) (“The doctrine of stare decisis, like almost every other legal rule, is not without its exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason.”). Here, however, the nearly identical language of the two street credit provisions, adopted as they were in similar cost-savings legislative moods, invites comparison and reliance.

### ***Conclusion***

Thus, we have it – an effort by Corrections to reduce prison populations by applying retroactive language when none exists. Corrections’ effort was premised upon an enactment by the General Assembly which given the evidence presented, generates questions which cannot be easily reconciled by resort to the oft-repeated refrain that “it’s a cost-savings measure” and therefore it must be legal. It is now apparent that there are public policy considerations which should have been at issue in addition to the narrowly focused claim of financial woe by an overburdened correctional agency.

After all, the evidence establishes that the two sentences which comprise our new street credit policy were buried in a massive budget bill by an author as yet unknown, much like its 2002 predecessor. And this single

little addendum to Kentucky's current budget bill which drastically altered the correctional landscape did so practically without notice--not even a moment of floor debate or a significant comment in committee, and only a single query posed in an informal meeting to an agency representative who was desperately seeking cost-savings measures to offset a shrinking budget.

As a result of this enactment, thousands of convicted felons, men and women convicted by plea and the juries of this Commonwealth, were discharged from supervision far earlier than anticipated by the presiding judges, attorneys, the public, and not least of all, the victims. In doing so, this little provision took no account of the nature of the crimes committed by those granted early discharge and mandated early release without regard to whether the worst sexual predators and drug abusers had completed treatment regarded as essential by sentencing courts. Moreover, nowhere in the envisioned savings to be generated by the anticipated mass exodus from Kentucky's prisons did anyone responsible for this legislation consider the financial and human costs of the anticipated thirty percent recidivism rate. Given the testimony, it is little wonder that—as intimated by the deputy state budget director—that the consideration of this legislation was completed only where television cameras and recorders couldn't reach.

These public policy issues are not within the purview or responsibility of the judiciary. The inquiry posed to the Court is far more discreet, and fortunately much more easily resolved. It is the conclusion of this Court that Montgomery has established that the Kentucky Department of Corrections is applying the street credit provision of HB 406 in violation of Ky. Rev. Stat. § 446.080(3) by awarding state prisoners and parolees credit for time spent on parole prior to the effective date of the legislation. Accordingly, having determined from the evidence presented that the rights of the Plaintiff are being and will be violated, the Court concludes that Montgomery is entitled to permanent injunctive relief. While the Court had previously extended its temporary injunction only to the counties of the 28<sup>th</sup> Judicial Circuit, largely because the facts were not fully developed at that juncture, the facts are now fully developed and certain, and the Court can find no reason to limit application of this injunction.

Therefore, for the reasons stated herein and for those reasons stated in the Court's Temporary Injunction as incorporated herein, *the Defendant is hereby ENJOINED from releasing from custody any prisoner currently incarcerated within a correctional institution of this state, and from granting a final discharge to any person now subject to parole supervision, as a result of any change caused or occasioned by the retroactive*

*application of House Bill 406.* Each of the other arguments raised by Montgomery are hereby ***DENIED***. All further issues are reserved pending further proceedings.

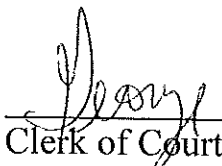
This the 30th day of April, 2009.

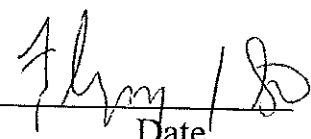
  
JUDGE, 28<sup>TH</sup> JUDICIAL CIRCUIT

Distribution:

Hon. Eddy F. Montgomery [✓]  
Commonwealth's Attorney

Hon. Wesley W. Duke [✓]  
Justice & Public Safety Cabinet

  
Clerk of Court

 4-29-09  
Date